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NO. 84-222

In the Supreme Court of the United States

OCTOBER TERM, 1984

ARTHUR W. STURGEON

Plaintiff,

VERSUS

STRACHAN SHIPPING COMPANY,
Defendant/Third-Party Plaintifff/Appellee-Petitioner

VERSUS

BANKERS & SHIPPERS
INSURANCE COMPANY OF NEW YORK,
Third-Party Defendant/Appellant-Respondent

VERSUS

AMERICAN MUTUAL LIABILITY
INSURANCE COMPANY,
Third-Party Defendant/Appellee-Petitioner

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN F. TOOLEY, JR.
743 Terry Parkway
Gretna, Louisiana 70053
Telephone: (504) 394-7077

Attorney for Bankers and Shippers
Insurance Company of New York

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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STATEMENT IN OPPOSITION

Respondent's opposition is most fully explained in it's Petition for En Banc Consideration for the Fifth Circuit

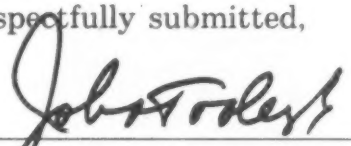
Court of Appeals (Appendix "A" herein). It was not necessary for the Fifth Circuit to reverse *McDaniels*[1] in order to distinguish and reverse the instant case. It was necessary for the Fifth Circuit to do so in order to bring that Circuit in line with all of the other Circuits and State opinions on this vital insurancce contract change.

Respondent leaves it's opposition to a reading of Appendix "A".

CONCLUSION

Respondent respectfully prays that this Honorable Court deny the Petition for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,



JOHN F. TOOLEY, JR.
748 Terry Parkway
Gretna, Louisiana 70053
Telephone: (504) 394-7077

Attorney for Bankers and Shippers
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[1] *McDaniels v. Great Atlantic & Pacific Tea Co., et al*, 602 F.2d 78 (5th Cir. 1979).

CERTIFICATE OF SERVICE

I hereby certify that three copies each of the above and foregoing have been served upon Jerome P. Halford, attorney for Arthur W. Sturgeon and Lawrence E. Larmann, attorney for Strachan Shipping Company and American Mutual Liability Insurance Company, via the United States mail, postage pre-paid, this 20 day of September, 1984.

JOHN F. TOOLEY, JR.
743 Terry Parkway
Gretna, Louisiana 70053
Telephone: (504) 394-7077

Attorney for Bankers and Shippers
Insurance Company of New York

APPENDIX "A"

STATEMENT OF THE ISSUES

The *McDaniels* case[1] did not adequately deal with the new loading and unloading coverage provisions of truckmen's liability policies, did not consider the exclusionary clauses in their historical context and is entirely out of step with developing law on that point. *Liberty Mutual Insurance Co. v. American Employers Insurance Co., et al*[2] decided by the then Justice Sam D. Johnson of the Supreme Court of Texas, was the most reasonable interpretation of the "borrowers" provision in the current policy. *Bankers and Shippers Ins. Co. v. Lockamy*, 440 A.2d 421 (Ct.Sp.App.Md.-1982) is the most recent.

McDaniels, was a simplistic statement by a panel on a serious problem to the trucking industry, without careful consideration of the overall history of the policy language and attempted solution by the industry and its insurance carriers. Numerous third-party claims are now being made around the country for a coverage that was intended to be excluded. Losses are being incurred. Premium rates must be changed along with application for tariff rate changes with the Interstate Commerce Commission.

McDaniels, should be reviewed, explained, modified and/or distinguished; but more importantly, it should be reversed, which a panel cannot do.

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[1] *McDaniels v. Great Atlantic & Pacific Tea Co., et al*, 602 F.2d 78 (CA 5-1979).

[2] *Liberty Mutual Insurance Co. v. American Employers Insurance Co., et al*, 556 S.W.2d 242 (Sup.Ct.Texas-1977).

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

Plaintiff, Arthur W. Sturgeon, filed his complaint against Strachan Shipping Company (Strachan) on March 14, 1979, for injuries received in New Orleans on March 4, 1979, when a bale of cotton fell from his tractor-trailer upon his back, causing a compression fracture. He alleged that defendant's forklift operators negligently caused the bale to fall upon him.[3]

Strachan answered,[4] but later filed a third-party complaint against appellant, Bankers and Shippers Insurance Company of New York (Bankers and Shippers) on the basis that they, Strachan, were "borrowers" of the tractor-trailer during the unloading process at the time of the accident, and were omnibus insureds entitled to a defense and/or atorney's fees and/or one-half (½) contribution.[5] Bankers and Shippers policy reads:

> "... Persons Insured (c) Any other person while using an owned automobile or a hired automobile with the permission of the named insured; provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission, but with respect to bodily injury or property damage arising out of the loading or unloading thereof, such other person shall be an insured only if he is:
>
> (1) a lessee or borrower of the automobile...[6]

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[3] Vol. 1, Doc. 1, pp. 1-4.

[4] Vol. 1, Doc. 4, pp. 8-10.

[5] Vol. 1, Doc. 25, pp. 75-77.

[6] Exhibit, Joint 2.

Bankers and Shippers answered admitting they insured plaintiff Sturgeon and his employer Pre-Fab Transit, but denied coverage to Strachan.[7] Bankers and Shippers cross-claimed as an alternative against American Mutual, Strachan's insurer, for contribution or for primary or excess coverage.[8]

All other parties were disposed of prior to trial. Following jury selection, the plaintiff's case was settled for $150,000.00 reserving defendant's rights *inter sese.*[9] Thereafter, the case between Strachan, Bankers and Shippers, and American Mutual was tried without jury.[10] On January 21, 1982, Judgment with reasons were rendered holding Bankers and Shippers liable for the entire claim against Strachan, plus attorney's fees and costs, with a holding that the trial Judge was bound by the *McDaniels* decision.[11]

Bankers and Shippers' third-party demand against Strachan's insurers for contribution was dismissed. American Mutual Liability Insurance Company (American Mutual) had a Comprehensive General Liability policy covering Strachan.[12] This policy excluded coverage for "bodily injury—arising out of the ownership, maintenance, operation, use, *loading or unloading* of (1) any automobile—

[7] Vol. 1, Doc. 52, pp. 131-32.

[8] Vol. 2, Doc. 112, pp. 308-09.

[9] Vol. 4, pp. 38-49; Vol. 5, pp. 1-8.

[10] Vol. 4, pp. 40-144; Docs. 84 and 85 (stipulated depositions, Vol. 4, pp. 82-84).

[11] Vol. 3, 154, pp. 388-405.

[12] Exhibit, Joint 3.

owned or operated by or rented or *loaned* to any insured—but this exclusion does not apply to the parking of an automobile on premises owned by, rented to or controlled by the named insured or the ways immediately adjoining, if such automobile is not owned by or rented or *loaned* to any insured."

American Mutual also had a Business Automobile Policy which provided that "for any covered automobile—you don't own, the insurance provided by this policy is excess over any other collectible insurance."[13]

The trial Court determined that the automobile policy was excess and that, since "borrow is the correlative of loan", the exclusion in the Comprehensive General Liability policy as to "loaned" vehicles applied and Bankers was primary carrier.[14]

After new trial motions, the Judgment of March 26, 1982 eliminated a $25,000.00 deductible in favor of Bankers and Shippers, but remained the same otherwise.[15] This appeal resulted.

STATEMENT OF THE FACTS

The facts are simple and undisputed, although each side argues the legal result.

On March, 4, 1979 Arthur W. Sturgeon was under

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[13] Exhibit, Joint 3.

[14] Vol. 3, pp. 393-95.

[15] Vol. 3, Docs. 155-65, pp. 406-32; Vol. 1, Bankers and Shippers Exhibit #2, p. 199; Vol. 5, pp. 1-8.

contract as an owner-driver of a tractor-trailer for Pre-Fab Transit Co.[16] His rig was a standard flat bed tractor-trailer.[17] On that date he delivered a load of baled cotton to the Robin Street Wharf under a bill of lading to Strachan Shipping Company.[18] He had never been there before.[19] He was directed by a security guard through one of the doors into the large covered wharf, and down a pathway between stowed cargo to where the cotton was to be unloaded.[20]

The Strachan section of the Robin Street Wharf runs some 720 feet along the river.[21] It is leased by them from the City of New Orleans Dock Board.[22] Strachan's employees and equipment perform all loading and unloading operations, which is true for most all flat bed loads.[23] Unquestionably Strachan employees directed the tractor-trailer driver to stop where it was convenient for them to unload on their premises; however, Strachan employees cannot operate, move or otherwise have any connection with the truck itself.[24]

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[16] Bankers and Shippers Exhibit 5; Joint Exhibit 1, Vol. 4; pp. 47-48.

[17] Vol. 4, pp. 49 and 58.

[18] Vol. 4, pp. 50-51.

[19] Vol. 5, p. 64.

[20] Vol. 4, pp. 64-67 and 98-99.

[21] Vol. 4, pp. 93-94 and 101-02.

[22] Vol. 4, pp. 94-95 and 101.

[23] Vol. 4, pp. 48-49, 85-92, 114-15 and 120.

[24] Vol. 4, pp. 62, 74-75, 96 and 100; Doc. 84, pp. 5-7, 15, 17, 23-26 and 47-48; Doc. 85, pp. 4-5, 12-15 and 26.

The truck driver gave his papers to the Strachan foreman who came up to his truck and told him to get ready for unloading.[25] The bales of cotton are covered and secured by tarpaulin, chains and tie-downs and are truck equipment.[26] Drivers must remove the tarpaulin, chains and tie-downs before the unloading operation can begin.[27] Strachan's employees used a forklift-type vehicle with "squeezer" blades that lifted the bales from the flatbed from the side.[28] Plaintiff removed the chains and binders holding the load, rolled up the tarpaulin for storage and began picking up numerous tie-downs on and around his truck, some of which had fallen to the floor.[29] While he was leaning over picking up the last few ties, after two Strachan employees started to unload his trailer, a bale of cotton fell upon his back causing his serious injury.[30]

ARGUMENT AND AUTHORITIES

There are several fallacies in *McDaniel.*

It hurts the assured who purchased the policies. It hurts the insurers who tried to carefully reword the policies to help their assureds.

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[25] Vol. 4, pp. 51-52 and 64-68.

[26] Vol. 4, pp. 49-61; Doc. 84, pp. 10 and 15; Doc. 85, pp. 8-10 and 15-17.

[27] Vol. 4, pp. 87, 92-93 and 117-18; Doc. 84, pp. 10, 15 and 47; Doc. 85, pp. 9-10 and 26.

[28] Vol. 4, pp. 97 and 102-03; Doc. 84, pp. 30-34; Doc. 85, pp. 8, 10-11 and 15-17.

[29] Vol. 4, pp. 52-58 and 68-73; Doc. 84, pp. 30-34; Doc. 85 pp. 8, 10-11 and 15-17.

[30] Vol. 4, pp. 53, 57 and 73; Doc. 85, pp. 19-22.

Interstate Carriers are fully regulated and their rates set by the Interstate Commerce Commission.[31] Drivers, too, are fully regulated and must meet strict standards.[32] Neither has any economic interest under the scheduled rates in assuming any financial loss by the daily multitude of unknown loaders and unloaders caused by their own negligence. Nor do they wish to pay the additional insurance premiums required by their insurers for such coverage to loaders and unloaders. They previously did cover all as "permissive users".[33]

Consequently, insurance carriers for the trucking industry changed their policy provisions previously covering all loaders and unloaders as omnibus insureds eliminating that exposure, thus reducing the insurance premiums charged to the trucking industry, and thereby affecting the rates charged the public as set by the Interstate Commerce Commission and Department of Transportation. The provision now restricts coverage to loaders and unloaders who are: "(1) a lessee or borrower of the automobile..."[34] This

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[31] *Interstate Commerce Act*, 49 USC 304.

[32] *Federal Motor Carrier Safety Regulations*, Bankers' Exhibit Nos. 3 and 4; Joint Exhibit No. 1, Sec. 6 and 7.

[33] 95 *ALR* 1122, Annotation, Risks within "Loading and Unloading" Clauses of Motor Vehicle Liability Insurance Policy; 7 *Am.Jur.2d*, Automobile Insurance, Sec. 89, pp. 396-97; 7 *Appleman*, Insurance Law and Practice, Sec. 4322, pp. 155-67 (1962); 7 *Blashfield*, Automobile Law and Practice, Sec. 315.7, pp. 588-91 (3rd Ed. 1966); 45 *C.J.S.*, Insurance, Sec. 829c(2), pp. 893-96; *Dairyland Insurance Co. v. Concrete Products Co.*, 203 N.W.2d 558 (S.C. Iowa-1973); *The Defense Research Institute, Inc.* "Loading and Unloading" Provisions of the Automobile Liability Insurance Policy (monograph 1965); 29 *Insurance Counsel Journal* 197 (1962) Brown and Risjord: Loading and Unloading; The Conflict between Tortious Adversaries; 13 *Vanderbilt Law Review* 903, (1960) Norman E. Risjord, Loading and Unloading.

[34] *Supra*, fn. 6.

attempt to restrict omnibus coverage by truckmen and their insurers is now being interpreted and is the main issue in this appeal.[35]

McDaniels simplistictly interpreted "borrower" as if it was the prior term "permissive user" and made that law applicable without consideration of the historical development of the policy terms. The ill-conceived *McDaniels* decision truly hurts the trucking industry because it is one of the first appellate decisions under the new policy terms. How will jury charges be determined? What factors must be considered? How will trucking companies determine whether or not it wants to deliver to a particular dock to load or unload? What are the factors determining what constitutes a borrowing? How does a carrier determine whether or not it wants to accept the risk or the responsibility of a particular bill of lading? Under the *McDaniels* case all of these factors are unknowns. Numerous claims are now being litigated—very expensively.

Restrictive clauses in insurance policies are restrictively construed in order to protect insureds. The assureds in this case are truckmen and carriers. Their rates are set by United States law. Insurance premiums are a part of their expenses included in that rate. Their interest is in paying premiums to cover themselves, not loaders and

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[35] 7 *Am.Jur.2d* (1980) Automobile Insurance, Sec. 206, Persons Covered, pp. 719-20; *Atlantic Mutual Insurance Co. v. Gulf Insurance Co.*, 596 S.W.2d 326 (Ct.Ap. Texas-1980); *Bankers and Shippers Insurance Co. of N.Y. v. Lockamy, et al*, 440 A.2d 421 (Md.App.-1982); *Black's Law Dictionary*, 5th Ed. 1979-"Borrower" p. 167; *Liberty Mutual Insurance Co. v. American Employers Insurance Co., et al*, 556 S.W.2d 242 (Sp.Ct. Texas-1977); *Protective Insurance Co. v. Coca-Cola Bottling Co.-Indianapolis, Inc.*, 423 N.E.2d 656 (Ct.Ap. Ind.-1981); *Robinson, et al v. Excalibur Insurance Co.*, 598 S.W.2d 324 (Ct.Civ.App. Texas-1980); *United States Fidelity & Guaranty Co. v. Federal Insurance Co.*, 39 N.E.2d 259 (App.Ct. Ill.-1979).

unloaders. The new policy provision eliminating coverage to loaders and unloaders is for the benefit of truckmen and carriers. That is their intention and it should inure to their benefit. An apt quote is:

> "A policy may limit the application of a loading and unloading clause, so that it will not apply to every person who otherwise would be covered under the omnibus clause. Thus, it may extend only to the named insured or a lessee or borrower of the vehicle. Where such a clause is employed, the mere fact that a consignee's employees unload the goods delivered does not render the consignee a "borrower" of the vehicle, since such an interpretation clearly would defeat the intended purpose of the policy limitation."[36]

McDaniels did not consider all of the policy terms, particularly that the tractor is the insured vehicle, not just the trailer. Never was there a consideration of a borrowing of the "entire" vehicle insured under the policy. Truckmen and their insurers' intention, and the reasonableness of the new insuring clause, is shown by a reading of the entire policy.

Bankers and Shippers Insurance policy provides a definition of hired automobile which distinguishes a semi-trailer.[37] This Court in *McDaniels* decided that A&P was the "borrower" of *the* vehicle, although they only had the right to enter the *trailer.* They had no right to drive, enter or have anything to do with the tractor, which is the insured "automobile" under the terms of this policy.[38] At no

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[36] 7*Am.Jur.2d,* Automobile Insurance, Sec. 206, pp. 719-20 (1980).

[37] Exhibits, Joint 1 & 2.

[38] *Supra,* fns. 28 and 37.

time was there a finding of any control of the use of the tractor; i.e., the controlling insured automobile that makes up "*the* vehicle", as if the driver had unshackled the tractor and driven off during the loading process leaving the semi-trailer in the control of the unloaders.

The *McDaniels* decision has caused consternation in the trucking industry and its insurance carriers. In the instant case, as in *McDaniel*, there was no right of control or even use of the entire insured "automobile", only the right to load or unload the trailer. The terms unloading and "borrowing" are not synonymous nor correlative for such a purpose.[39]

CONCLUSION

McDaniels v. Great Atlantic & Pacific Tea Co., et al, supra, be reversed; and the judgment of the trial Court herein should be reversed and judgment rendered herein in favor of Bankers and Shippers Insurance Company of New York dismissing the demands against it; or, alternatively, for a finding that American Mutual Liability Insurance Company is liable over to Bankers and Shippers Insurance Company of New York for one-half (½) of the amount of the compromise with a credit to Bankers and Shippers for its $25,000.00 deductible portion.

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[39] *Supra*, fn. 35.